

**A Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd
 (formerly known as Boustead Trading (1985) Sdn Bhd)**

**B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–47 OF
 2008(W)
 ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND GOPAL SRI
 RAM FCJ
 16 JULY 2009**

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Companies and Corporations — Winding up — Liquidators — Liquidator granted permission to former director of appellant, who was neither a contributory nor creditor of appellant, to continue with pending action against respondent —
D *Whether Director General of Insolvency could authorise former director of company in liquidation, who was neither a contributory nor creditor, to use company's name to bring, continue or defend action — Companies Act 1965 s 236(1)(e) & (2)(a)*

E Sometime in 1999, while the appellant was still a going concern it commenced an action against the respondent for goods sold and delivered. However on 28 September 2004 the appellant was compulsorily wound up by an order of court and could not continue with its action pending against
F the respondent ('the pending action'). By way of a letter dated 16 March 2005, the Director General of Insolvency ('the DGI') granted one Khaidzir bin Hj Ishak, a former director of the appellant ('the former director'), permission to engage solicitors to prosecute the pending action. With that permission the appellant applied to the High Court for a mareva injunction
G against the respondent to restrain it from transferring its assets to a third party. The trial judge found that as the appointment of the solicitors to proceed with the pending action was not made by the official receiver but by a former director of the appellant, who was neither a contributory nor creditor of the appellant, s 236 of the Companies Act 1965 ('the Act') could
H not apply. The trial judge then went on to conclude that under s 236(1)(e) of the Act an advocate could only be appointed with the authority of the court or a committee of inspection and that therefore the application for a mareva injunction by the solicitors appointed by a former director ought to be dismissed. This court granted the appellant leave to appeal on the question
I as to whether the DGI was authorised to appoint an advocate and solicitor to institute or defend legal proceedings pursuant to s 236(2)(a) of the Act independent of s 236(1)(e) of the Act. However as arguments developed it became apparent that the real issue in this instant appeal was whether the DGI could authorise a former director of the company in liquidation, who

was neither a contributory nor creditor, to use the company's name to bring, continue or defend an action.

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Held, dismissing the appeal with costs:

- (1) (per **Zaki Azmi Chief Justice**) Although the appointment of an advocate by a liquidator pursuant to s 236(2)(a) of the Act does not require leave of the court, the appointment under s 236(1)(e) of the Act requires the leave of the court for that is when he needs an advocate to assist him in his duties (see para 12).
- (2) (per **Gopal Sri Ram FCJ**) Since a director, or more appropriately a former director of a company in liquidation is not a party to the liquidation a court will not authorise him to launch or to continue proceedings or even to defend them. As such, the liquidator had no power to confer such authority since he could not do what the court would not do on his default. Therefore, the former director in the instant case ought not to have been authorised to continue with the proceedings (see para 7).
- (3) (per **Gopal Sri Ram FCJ**) A liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s 236(2)(a) without the leave of the court or the committee of inspection. Therefore, although the order of the trial judge was entirely correct he was wrong in his reasoning (see paras 8–9).

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[Bahasa Malaysia summary]

Sekitar 1999, semasa perniagaan perayu masih beroperasi ia memulakan satu tindakan terhadap responden untuk barang-barang yang telah dijual dan dihantar. Walau bagaimanapun pada 28 September 2004 perayu telah digulungkan melalui satu perintah mahkamah dan tidak dapat meneruskan tindakannya yang belum diputuskan terhadap responden ('tindakan tergantung'). Melalui sepucuk surat bertarikh 16 Mac 2005, Ketua Pengarah Insolvensi ('DGI') membenarkan seorang bernama Khaidzir Hj Ishak, bekas pengarah perayu ('bekas pengarah'), kebenaran untuk guna khidmat peguam cara untuk meneruskan tindakan tergantung tersebut. Dengan kebenaran itu perayu memohon kepada Mahkamah Tinggi untuk satu injunksi mareva terhadap responden bagi menghalangnya daripada memindahkan aset-aset kepada pihak ketiga. Hakim perbicaraan memutuskan bahawa pelantikan peguam cara itu bagi meneruskan tindakan tergantung tersebut tidak dibuat oleh pegawai penerima tetapi oleh bekas pengarah perayu, yang bukan penyumbang ataupun pemiutang perayu, maka s 236 Akta Syarikat 1965 ('Akta') tidak boleh digunapakai. Hakim perbicaraan kemudiannya memutuskan bahawa di bawah s 236(1)(e) Akta seorang peguam bela dan peguam cara hanya boleh dilantik dengan kuasa mahkamah atau

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- A jawatankuasa pemeriksaan dan oleh itu permohonan untuk satu injunksi mareva oleh peguam cara yang dilantik oleh bekas pengarah sepatutnya ditolak. Mahkamah ini memberikan perayu kebenaran untuk merayu terhadap persoalan sama ada DGI telah diberi kuasa bagi melantik seorang peguam bela dan peguam cara untuk memulakan atau membela suatu
- B prosiding undang-undang menurut s 236(2)(a) Akta bebas daripada s 236(1)(e) Akta tersebut. Walau bagaimanapun tetapi setelah penghujahan dibuat ia menjadi ketara bahawa isu sebenar dalam rayuan ini adalah sama ada DGI boleh membenarkan bekas pengarah syarikat yang digulungkan yang bukan penyumbang ataupun pemiutang, untuk menggunakan nama syarikat itu bagi membawa, meneruskan atau membela suatu tindakan.
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Diputuskan, menolak rayuan dengan kos:

- (1) (oleh **Zaki Azmi Ketua Hakim Negara**) Walaupun pelantikan seorang peguam bela oleh seorang penyelesaian di bawah s 236(2)(a) Akta tidak memerlukan kebenaran mahkamah, pelantikan di bawah s 236(1)(e) Akta tersebut memerlukan kebenaran mahkamah apabila beliau memerlukan seorang peguam bela bagi membantunya dalam tugas-tugasnya (lihat perenggan 12).
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- (2) (oleh **Gopal Sri Ram HMP**) Memandangkan seorang pengarah, atau seorang bekas pengarah sebuah syarikat dalam likuidasi bukan satu pihak dalam likuidasi tersebut mahkamah tidak akan membenarkannya untuk memulakan ataupun meneruskan prosiding atau juga membelanya. Oleh itu, penyelesaian tidak mempunyai kuasa untuk mengurniakan kuasa sedemikian memandangkan dia tidak dapat lakukan apa yang mahkamah tidak akan lakukan atas keingkarannya. Oleh itu, bekas pengarah dalam kes ini sepatutnya tidak diberikan kebenaran untuk meneruskan dengan prosiding tersebut (lihat perenggan 7).
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- G (3) (oleh **Gopal Sri Ram HMP**) Seorang penyelesaian yang ingin melantik seorang peguam bela dan peguam cara bagi mendakwa, meneruskan atau membela satu tindakan oleh atau terhadap syarikat dalam likuidasi boleh berbuat demikian di bawah s 236(2)(a) tanpa kebenaran mahkamah atau jawatankuasa pemeriksaan. Oleh itu, walaupun perintah hakim perbicaraan keseluruhannya betul namun beliau silap dalam taakulannya (lihat perenggan 8–9).]
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Notes

- I For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1202–1204.

Cases referred to

Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor [1993] 1 MLJ 119; [1993] 2 CLJ 68, HC (refd)

- Cape Breton Company v Fenn* (1881) 17 Ch D 198 (refd) A
- Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262; [1999] 7 CLJ 172, HC (refd)
- Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd* [2006] 4 MLJ 1; [2006] 2 CLJ 757, HC (refd) B
- Russell v Westpac Banking* 13 ACSR 5 (refd)
- Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899, HC (folld)
- Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang* [2002] 2 MLJ 439; [2002] 6 CLJ 340, HC (refd) C
- Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as 'Boustead Trading (1985) Sdn Bhd')* [2008] 8 MLJ 247; [2008] 9 CLJ 194, HC (refd) D

Legislation referred to

Companies Act 1965 s 236, 236(1)(e), (2), (2)(a)
Interpretation Acts 1948 and 1967

- Appeal from:** Civil Reference No W-02(IM)-742 of 2008 (Court of Appeal, Putrajaya) E
- John Clark Sumugod (Bartholomew Lopez with him) (Sidek Teoh Wong & Dennis) for the appellant.*
- Fabri Azzat (Azzat & Izzat) for the respondent.* F

Zaki Azmi Chief Justice:

[1] Leave to appeal to the Federal Court was granted on the following question: G

Whether the official receiver/liquidator can appoint an advocate and solicitor to bring an action or to defend an action solely by relying on s 236(2)(a) of the Companies Act 1965 independent of s 236(1)(e). H

[2] From the question, it would seem that the main issue is the interpretation of s 236(1)(e) and s 236(2)(a) of the Companies Act 1965. This section deals with the power of the liquidator to 'appoint an advocate to assist him in his duties' as an advocate to act on behalf of the wound up company. By the way, according to the Interpretation Acts 1948 and 1967, 'advocate' means an advocate and solicitor of the High Court. I

- A** [3] The dispute arose because Messrs Sidek Teoh Wong & Dennis (Messrs Sidek Teoh) was appointed without authority of the court or the committee of inspection. The appellant argues that the authority of the court or the committee of inspection is not necessary because they are relying on s 236(2)(a).
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- C** [4] At the outset of the appeal we posed to the appellant's counsel the question as to whether this court's ruling based on the question would benefit the appellant in this case. This question was put to the appellant for two reasons. Firstly this issue was raised during an application by the appellant for mareva injunction against the defendant to restrain the defendant from transferring its assets to a third party. That mareva injunction was dismissed by the learned High Court judge. The suit was filed in 1999. On 28 September 2004, a winding up order was made against the plaintiff.
- D** [5] The application for mareva injunction was filed by Messrs Sidek Teoh purportedly on behalf of the official receiver and plaintiff in August 2007. The application for mareva injunction was dismissed on 12 June 2008. We only heard this appeal on 16 June 2009.
- E** [6] For myself, I suspected that the issue had become academic. However, the appellant, while admitting it may be academic, persisted and said that it would still be applicable to several other pending applications at the High Court.
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- G** [7] The second reason why I thought that the appeal is academic is because our decision will be based on the findings of fact by the learned trial judge. The learned trial judge held that even if s 236 is to be decided in favour of the appellant, the appointment of Messrs Sidek Teoh as advocates was not made by the official receiver but by one Khaidzir who is neither a contributor nor a director at the time he appointed Messrs Sidek Teoh. He was merely an ex-director of the appellant company. Section 236 cannot apply because under that section the appointment must be by the liquidator who in this case, is the official receiver. This is quite obvious because from the two letters signed by the official receiver addressed to En Khaidzir, it is clear that the appointment of Messrs Sidek Teoh was not made by the official receiver. In one letter the official receiver used the words 'kami tiada bantahan untuk tuan mewakili kes di atas' and the other addressed to En Khaidzir 'permohonan tuan untuk melantik Tetuan Sidek Teoh Wong & Dennis ... adalah dibenarkan'.
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- [8] This case could have just been disposed on that issue alone. However, before dismissing the application for a mareva injunction, the learned judge went at length to discuss s 236(1)(e) and s 236(2). And after a lengthy

discussion quoting several High Court judgments, he concluded that an advocate can only be appointed under s 236(1)(e) with the authority of the court or a committee of inspection.

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[9] The learned judge during the course of his judgment cited *Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang* [2002] 2 MLJ 439; [2002] 6 CLJ 340, *Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899, *Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd* [2006] 4 MLJ 1; [2006] 2 CLJ 757 and *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262; [1999] 7 CLJ 172. He also considered the opposing views expressed in *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119; [1993] 2 CLJ 68. He concluded that he agreed with the judgment in *Bensa*. In the first set of judgments beginning with *Selvam Holdings*, the ruling was that s 236(1)(e) 'does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator'. This is in line with the other three cases. *Bensa* on the other hand decided that 'a liquidator must obtain prior authority of the court or the committee of inspection'.

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[10] An important aspect of the duties of a liquidator is to recover debts and properties due to the company as well as to assert its rights. This would more often than not involve proceedings in courts. He is also obliged to defend proceedings brought against the company. Again, these proceedings could be claims for monies and other assets of the company. The liquidator must appoint an advocate and solicitor to act for them in these cases. The appointment of an advocate is necessary to represent him in court. The Rules of the High Court require a company to be represented in court by an advocate. The question is whether an appointment for this purpose also requires the sanction or consent of the court. I do not think so. It is quite obvious that an advocate needs to be appointed when it involves proceedings in court. A consent or sanction of the court becomes superfluous.

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[11] The liquidator's other duties include, for example, power to effect a compromise with the company's debtors where the amount claimed by the company exceeds the prescribed amount. Other duties would include entering into contracts with different parties. In these circumstances, he would also require the advice of an advocate. 'Presumably, the reason for

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A requiring the court's or committee's approval in these cases is that the matters involved are sufficiently important, or the possibility of errors or fraud sufficiently great, to justify the imposition of a restriction on the liquidator's liberty of action' (see A Keay (1999), McPherson, *The Law of Company Liquidation* (4th Ed) LBC Information Services, Sydney at p 333).

B [12] These views expressed by the author, support the views expressed by Abdul Aziz Mohamad J (as he then was) in *Selvam Holdings* and I agree with the learned judge's view. An appointment of an advocate by a liquidator pursuant to s 236(2)(a) of the Companies Act does not require leave of the court because he clearly needs the services of an advocate to bring or defend a legal action. Only the appointment under s 236(1)(e) requires the leave of the court and that is when he needs an advocate to assist him in his 'ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence' (to borrow the words of Abdul Aziz J). I do not need to quote the full text from his judgment as my learned brother Gopal Sri Ram FCJ has done so.

E [13] In the light of what I had said earlier in para 8, this appeal is dismissed with costs and deposit to be utilised towards costs.

Gopal Sri Ram FCJ:

F [14] On 24 November 2008, this court granted the appellant leave to appeal on the following question: whether the official liquidator of the Department of Insolvency is authorised to appoint an advocate and solicitor to institute or defend legal proceedings pursuant to s 236(2)(a) of the Companies Act 1965 ('the Act'), independent of s 236(1)(e) of the Act. However, as arguments developed before us at the hearing proper on 16 June 2009, it became apparent that s 236 had really nothing to do with the fact pattern of this appeal, although that provision had been erroneously referred to and relied upon by the parties in the courts below. The real issue at the heart of this appeal is whether sanction may be granted by the Director General of Insolvency ('the DGI') to a former director of a company in liquidation who is also not a contributory or creditor to use the name of the company to bring, continue or defend an action.

I [15] The relevant facts and the arguments advanced on s 236 have been admirably dealt with by Hishamudin J (now JCA) who heard the matter at first instance and whose judgment has been reported in *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as 'Boustead Trading (1985) Sdn Bhd')* [2008] 8 MLJ 247; [2008] 9 CLJ 194. I therefore find it sufficient

merely to allude to those facts purely relevant to the issue at stake.

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[16] As long ago as 1999, the appellant, then a going concern, brought an action against the respondent for goods sold and delivered. On 28 September 2004, while the action was afoot, the appellant was compulsorily wound up by an order of that date. By a letter dated 16 March 2005, the DGI gave his consent to one Khaidzir bin Hj Ishak, a former director, though not a contributory or a creditor, of the appellant to engage the services of a firm of solicitors to prosecute the action pending against the respondent. Although the letter does not expressly say as much, its proper construction admits only of the conclusion, namely, that the DGI was granting his permission, on terms, to Khaidzir to use the name of the appellant in liquidation for the limited purpose of continuing with the action in question. It may be advisable for the DGI in future cases to grant such consent in clear terms. After having obtained permission, the appellant moved the High Court inter partes for a Mareva injunction. The application was opposed principally on the ground that the DGI had to seek leave of the court or the committee of inspection under s 236(1)(e) before he permitted the appointment of solicitors. And so, the case went tangentially off course.

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[17] What appears to have been overlooked all round is the fundamental principle that once a limited company is wound up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. However, there is jurisdiction in the court to authorise other persons to conduct litigation in the name of the company.

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[18] In *Russell v Westpac Banking* 13 ACSR 5, King CJ when delivering the judgment of the Full Court of South Australia said:

When the company is in liquidation, the person in whom is vested the authority to institute proceedings, is the liquidator: *Scarel Pty Ltd v City Loan & Credit Corporation Pty Ltd* (1988) 12 ACLR 730. There is power, however, in the court to authorise other persons to conduct litigation in the name of the company: *Cape Breton Company v Fenn* (1881) 17 Ch D 198; *Aliprandi v Griffith Ventures Pty Ltd* (1991) 6 ACSR 250.

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[19] Of course, resort to the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court. Once authority is given either by the liquidator or by the court, the person

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- A authorised may appoint counsel of his or her choice to prosecute the proceedings in question. The only issue is whether it is competent for the liquidator to authorise a former director of the company in liquidation to use the company's name to commence, continue or defend proceedings. The answer to that question was provided by Cotton LJ in *Cape Breton Company v Fenn* (1881) 17 Ch D 198 as follows:
- B ... prima facie proceedings in the name of the company ought to be conducted by the liquidator — as officer appointed by the court and subject to the supervision of the court. There may be, no doubt, special cases where, although the court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is improper, it may give power to other persons to conduct the litigation upon their giving proper indemnity against any consequences of that litigation. But who are the persons who can be authorised to take these steps? In my opinion the creditors and the contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act can intervene if they are advised that the liquidator does not properly do his duty. They have a right in special cases to ask the court for leave to do that which the liquidator is advised not to do, or which the liquidator is advised not to do, viz, take proceedings in the name of the company, but in my opinion the power of the court to give leave to use the name of the company, but in my opinion the power of the court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation. The court has, in my opinion, no power whatever to give persons in the position of the solicitors authority to use the name of the company in any litigation against any person.
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- F [20] Since a director — or more appropriately a former director — of a company in liquidation is not a party to the liquidation a court will not authorise him or her to launch or to continue proceedings or indeed to defend them. A fortiori, the liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. It follows that
- G Khaidzir bin Hj Ishak ought not to have been authorised to continue with the proceedings. I would on that ground support the ultimate order made by the learned judge in the High Court. It may well have been different if Khaidzir had also been a creditor or a contributory.
- H [21] For completeness there remains the question whether the learned judge was correct in holding that the liquidator in this case had to obtain leave of the court to appoint an advocate and solicitor to conduct the litigation. With respect I must express my disagreement. In my judgment, the correct view is that expressed by Abdul Aziz J in *Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor* [1994] 4 CLJ 899 as follows:
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The second point is that s 236(1)(e) does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s 236(1) speaks of the appointment of an advocate by a liquidator 'to assist him in his duties'. In my opinion the duties envisaged are the ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence. It is only that kind of duties that the word 'to assist' can comfortably go along with.

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When a liquidator is sued, as in this case, the liquidator has a problem which falls outside his professional competence as liquidator and for which he must engage an advocate and solicitor to represent him to resist the suit. The first respondent's duty to resist this application is not, in my opinion, one of a kind intended by the word 'duties' in paragraph (e), and counsel acting for him in this case cannot be said to have been appointed by him 'to assist him in his duties'.

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As to whether a liquidator's power to appoint an advocate to defend him falls under s 236(2)(a) or (i) is a secondary question. Paragraph (i) of s 236(2) — which gives power to 'appoint an agent to do any business which the liquidator is unable to do himself' — appears to be wide enough to enable liquidator to appoint an advocate and solicitor to defend him. If in defending this application the first respondent can be said to be doing so 'in the name and on behalf' of the applicant, I would decidedly say he had power, under paragraph (a) of s 236(2), to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor.

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Whatever the position may be under s 236(2), as long as the first respondent is not caught by paragraph (e) of s 236(1) — and I do not think he is — he does not need to get the authority either of the court or of the committee of inspection to appoint an advocate and solicitor.

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In short, a liquidator who wishes to appoint an advocate and solicitor to prosecute, continue or defend an action by or against the company in liquidation may do so under s 236(2)(a) without the leave of the court or the committee of inspection.

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[22] It follows that the learned judge was wrong in his reasoning although the order he made was entirely correct. It also follows that *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119; [1993] 2 CLJ 68 which the judge preferred when arriving at his conclusion was wrongly decided and is not good law.

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[23] For the reasons already given, I would dismiss this appeal and affirm the orders of the courts below, albeit for different reasons. The appellant must pay the costs of this appeal. The deposit shall be paid out to the respondent.

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A [24] The president of the Court of Appeal has seen this judgment in draft and has expressed his agreement with it.

Appeal dismissed with costs.

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Reported by Kohila Nesan

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